Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Avalotis Painting Company, Inc.

File: B-261481

Date: August 24, 1995

John E. Beard III, Esq., Kirkpatrick & Lockhart, for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A bid which on its face is an offer to paint 1,800 square feet but which contains an extended price that is more consistent with a bid based on 18,000 square feet is ambiguous and cannot reasonably be construed as constructively acknowledging an amendment that increased the required surface to be painted from 1,800 to 18,000 square feet.

DECISION

Avalotis Painting Company, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW59-95-B-0013, issued by the United States Army Corps of Engineers, Pittsburgh District, for painting the emergency bulkhead hoist structure at Hildebrand Lock and Dam. Avalotis's bid was rejected as nonresponsive because the protester did not acknowledge an amendment to the IFB and submitted its bid using the original bid schedule form rather than the bid schedule provided by that amendment.

We deny the protest.

The IFB's bid schedule, as originally issued, required bidders to provide on line item 0003 a unit price per square foot and an extended price to clean and repaint the surface of the bulkhead hoist structure, which was estimated as 1,800 square feet. A note on the schedule asked that bidders not round off totals and stated that if there were a discrepancy between the unit and extended prices, the unit price would be considered to be the bid.

Prior to bid opening, the Army issued amendment No. 1, which revised the bid schedule by increasing the estimated surface quantity of bulkhead hoist structure to be cleaned and repainted to 18,000 square feet. No other changes were made. Amendment No. 2, also issued prior to bid opening, extended the bid opening date to April 25, 1995, and incorporated a new wage rate determination.

Eight bids were opened on April 25. Avalotis submitted the low bid which acknowledged only amendment No. 2, and used the original bid schedule, which indicated 1,800 square feet as the surface area to be cleaned and repainted. Avalotis bid a unit price of $3.83 per square foot and an extended price of $68,925. The Army determined that Avalotis's bid was nonresponsive for failure to acknowledge amendment No. 1 and, upon learning of this determination, Avalotis filed this protest.

Avalotis argues that its failure to formally acknowledge its receipt of amendment No. 1 should be waived as a minor informality, under Federal Acquisition Regulation (FAR)
§ 14.405(d)(1)[1], because its extended bid price included the work added by that amendment. The protester points out that when its $3.83 unit price is multiplied by 1,800 square feet, the total equals $6,894; but, when the $3.83 unit price is multiplied by 18,000 square feet, the total equals $68,940, its extended bid price.[2] The protester contends that its bid constructively acknowledged the amendment and its intention to be bound thereby.

As a general rule, a bidder's failure to acknowledge a material amendment renders the bid nonresponsive, thus requiring that the agency reject the bid. This rule is premised upon two facts. First, that acceptance of a bid when an amendment has not been acknowledged affords the bidder the opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. Second, if such a bid were accepted, the bidder would not be legally bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. Childrey Contract Servs., Inc.; Orkin Exterminating Co., B-258653; B-258653.2, Feb. 9, 1995, 95-1 CPD ¶ 60; C Constr. Co., Inc., 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534.

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[1]FAR § 14.405(d)(1) provides, in relevant part, that the failure to acknowledge a solicitation amendment may be waived as a minor informality where: "[t]he bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the [IFB] and the bidder submitted a bid on the item."

[2]Avalotis claims that its actual bid of $68,925 is a rounded figure for the $68,940 figure obtained when $3.83 is multiplied by 18,000 square feet.

An amendment may be constructively acknowledged, however, where the bid itself includes one of the essential items appearing only in the amendment. Thus, we have found that a bidder's failure to acknowledge an amendment could be waived when, for example, the bid clearly showed that it included a price for an item that was added by the amendment, 34 Comp. Gen. 581 (1955), or a price for quantities reduced by an amendment. Nuclear Research Corp.; Ridgeway Elecs., Inc., B-200793, B-200793.2, June 2, 1981, 81-1 CPD ¶ 437. We also have found constructive acknowledgment when the bidder agreed to use materials other than those required by the original solicitation, W.A. Apple Mfg., Inc., B-183791, Sept. 23, 1975, 75-2 CPD ¶ 170, aff'd, Mar. 2, 1976, 76-1 CPD ¶ 143, or when the bid included an acceptance period that was different from that imposed by the original solicitation. Shelby-Skipwith, Inc., B-193676, May 11, 1979, 79-1 CPD ¶ 336.

These decisions are consistent with the regulatory provision that permits a bidder's failure to acknowledge an amendment to be waived as a minor informality or irregularity if the bid "clearly indicates that the bidder received the amendment." FAR § 14.405(d)(1); C Constr. Co., Inc., supra. In a constructive acknowledgment situation, only the bidder's failure to acknowledge the amendment is waived, not the bidder's compliance with the amended solicitation. Id.

Here, Avalotis did not make any modification to its bid schedule to reflect the revised requirements of amendment No. 1 and, notwithstanding the protester's statement that it considered the amendment in calculating its price, the bid submitted by Avalotis does not clearly show that its price includes the work requirements added by that amendment. Rather, on its face, Avalotis's bid is an offer to clean and paint 1,800 square feet of hoist structure.

Despite the protester's explanation of its computation of its extended bid price, there is nothing in the Avalotis bid to clearly establish that the firm received amendment No. 1 and intended to be bound by it. At best, Avalotis's bid is ambiguous: the bid may be an offer to paint 1,800 square feet of hoist structure for $3.83 per square feet, 1,800 square feet for some other amount; it may even be an offer to paint 18,000 square feet, but there is no way to tell that with any reasonable certainty from the bid itself. Accordingly, because of the reasonable uncertainty that Avalotis had agreed to provide the additional quantity of services required, the agency properly rejected the bid as nonresponsive.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel